

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

DAYTON HEIDELBERG DISTRIBUTING CO. ^{1/}

Employer

and

Case 9-RC-18318

RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION, LOCAL 379, AFL-CIO ^{2/}

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

I. INTRODUCTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board on September 20, 2010. The Employer, a corporation, is a wholesale distributor of beer, wine and spirits, with a facility in Columbus, Ohio, the only facility involved in this proceeding. The Petitioner seeks to represent a unit comprised of all full-time drivers employed at the Employer's facility, but excluding all other employees, warehouse employees, sales employees, office clerical employees, professional employees, managers, guards, and supervisors as defined in the Act. The Employer, contrary to the Petitioner, asserts that its warehouse employees share an indivisible community of interest with the drivers and an appropriate unit must be comprised of both drivers and warehouse employees. There is no history of collective bargaining affecting any of the employees involved in this proceeding. ^{3/}

^{1/} The name of the Employer appears as amended at the hearing.

^{2/} The name of the Petitioner appears as amended at the hearing.

^{3/} Although there is no history of collective bargaining affecting employees at the Columbus, Ohio facility, the record reflects that four of the Employer's other Ohio facilities are subject to collective-bargaining agreements with unidentified labor organizations where the bargaining units consist of drivers and warehouse employees. While the Employer asserts that these four facilities operate in the same manner as the Columbus facility, the Employer failed to adduce sufficient evidence for me to fully examine such assertion. Moreover, I would not consider the Employer's bargaining relationships with other labor organizations to be dispositive of the unit issue at this facility. Similarly, I do not find the testimony elicited regarding the composition of bargaining units at other unrelated Ohio wine and beer distributors to be probative of the issue here.

I have considered the record evidence as a whole, as well as the arguments made by the parties at the hearing and in their post-hearing briefs. As more fully explained below, I conclude that the unit sought by the Petitioner comprised solely of the Employer's drivers is not an appropriate unit for purposes of collective bargaining and that the unit must also include the warehouse employees. Central to this conclusion is my finding that the drivers do not have a sufficiently distinct community of interest separate from that of the warehouse employees. Because the Petitioner wishes to proceed to an election in any unit found appropriate, I will direct an election in a unit comprised of all full-time and regular part-time drivers and warehouse employees employed by the Employer at its Columbus, Ohio facility.

In explaining how I came to my conclusion on this issue, I will first give an overview of the Employer's operations. I will then set forth the applicable legal precedent and analyze the issues raised in relation to that precedent.

II. THE EMPLOYER'S OPERATIONS

The Employer buys and imports beer, wine and spirits from all over the world which it sells to licensed accounts or retail operations that are licensed to sell alcoholic beverages. The Columbus, Ohio facility serves 30 counties in southeastern Ohio and is housed in a 100,000 square foot warehouse. At the Columbus facility, the Employer employs approximately 50 salespeople, who generate customer orders; 42 warehouse employees, who receive, stage and pull product; and, 29 drivers who handle deliveries to customers. Greg Maurer, the executive vice-president and general manager of the Employer's Columbus facility, has overall responsibility for the facility. Operations/Warehouse Manager Thomas de la Pena reports directly to Maurer and oversees four individuals who directly supervise the employees at issue; Jim Knellinger, who supervises the drivers; John Donnelly, who is in charge of the day shift warehouse employees; and, Gary Vance and Warren Conkey, who supervise the night warehouse employees. Maurer testified that even though Knellinger and Donnelly have separate responsibility for the drivers and day warehouse employees, respectively, they work "as a team" and each has the authority to direct and supervise both groups of employees.

The warehouse employees are divided between two shifts referred to in the record as day warehouse, numbering 17 employees, and night warehouse, numbering 25 employees. Day warehouse employees work from 6:30 a.m. to 3:30 p.m., Monday through Friday. They receive the Employer's inbound product and then place the product in back stock and in a staging area, (also called the "picking area"), from which product is pulled and packaged for delivery to customers. The "picking area" occupies about one third of the Employer's facility. One of the day warehouse employees, Ian Burke, spends about 75 percent of his workday doing "driver check-in." This involves the drivers checking in their trucks with him after completing their routes so that he can tally any returned or leftover product. The record does not indicate the extent to which he must interact with each driver to accomplish this task; however, the testimony of former driver Caston Kellough, who resigned his employment prior to the hearing, reflects that drivers have contact with Burke during this process.

Night warehouse employees, who are assigned to the "picking area," work Monday through Thursday, beginning at 5:30 p.m. each day and typically work 8 to 12 hours a night,

depending on their work load. Using a "pick sheet," which is essentially an order sheet for each of the Employer's delivery routes, they pull and package the product and load it onto the delivery trucks used by the drivers. Night warehouse employees physically drive the trucks into the warehouse picking area so that they can be loaded. It appears from Maurer's testimony that the trucks are leased by the Employer from Hogan Trucking, although not necessarily stored at Hogan's facility. Maurer described Hogan as its "lease partner" and testified that "there are times" when the night warehouse employees have to pick trucks up from Hogan. He also testified that night warehouse employees "occasionally" pick up trucks that have been left at special events and drive them back to the facility.

Twenty-nine drivers are assigned to deliver product along 26 regular delivery routes, in addition to "special" or extra deliveries when warranted by increased demand or special events. The drivers are scheduled to work Tuesday through Friday, with staggered starting times between 4:15 a.m. and 6:30 a.m., and typically work 10-hour days. They may also volunteer to work on Mondays, when the Employer has a much lighter delivery schedule, but this is not mandatory. Drivers who volunteer to work on Monday are responsible for "picking" product and loading their own trucks, which they do in the "picking area." If an entire skid of product needs to be loaded onto their truck, the day warehouse employees are available to perform such task; however, the record does not indicate how frequently this occurs. Up to 8 or 9 drivers might volunteer to work on a typical Monday.

When the drivers arrive at work on Tuesday through Friday, their trucks are already loaded and their required paperwork is ready. The record does not disclose who prepares the paperwork. After reviewing their paperwork, the drivers fill out their route sheets and "check out" their respective trucks, which typically takes about 20 minutes, but could take up to an hour if the check out process gets delayed. It appears from the record that the trucks are kept inside the facility in the "picking area." The record does not describe the procedure by which drivers "check out" the trucks and there is no record evidence indicating whether they interact with either day or night warehouse employees in accomplishing this task. Kellough testified that he had little to no interaction with warehouse employees in performing his job. After checking out their trucks, the drivers proceed on their routes. Each route has between 15 and 30 stops, with some delivery locations being as far away as 2 hours driving time. At each stop, the driver unloads the product to the customer, verifies that the order is correct and collects payment, which is required by State law. After completing their routes, the drivers return to the facility to check in their trucks to day warehouse employee Burke.

All drivers and warehouse employees are required to have a valid driver's license. The drivers are not required to have a CDL license to operate the trucks. The record reflects that since the beginning of 2010, the Department of Transportation (DOT) has required that drivers obtain medical certification verifying that they are physically able to operate the trucks. The Employer has also imposed this requirement on 11 of the day warehouse employees, even though not required by the DOT. Otherwise, there are no special certification requirements or skills for any of the classifications at issue in this proceeding.

The record discloses that employees have permanently transferred between the driver and warehouse classifications. Don Howe, a day warehouse employee, transferred to a driver

position and 2 drivers, Ian Burke and Chris Brown, transferred to the day warehouse. There is also evidence that the Employer regularly uses day warehouse employees as drivers to make deliveries. According to Maurer, this typically occurs one or two times per week due to either increased route deliveries or when the Employer receives special orders. Former driver Kellough testified that another formerly employed warehouse employee, Terry Kaiser, also made deliveries. Kellough testified that he knew of three warehouse employees – Brown, Howe and Kaiser – whom the Employer used as back up drivers.^{4/} The Employer also adduced record testimony that drivers work in the warehouse “one or two days a week.” If the record does not define “work,” I would not “presume” its meaning. The record reflects that employees who perform tasks outside of their classification receive their regular pay and are not required to clock in and out under different classifications.

Newly hired drivers and warehouse employees receive the same job orientation from the Employer. They receive identical benefits, such as health insurance and paid leave, and are covered by the same employee handbook. All employees are hourly paid and use the same time clock. Drivers and day warehouse earn an initial hourly wage of \$10, while night warehouse employees’ wage rate starts at \$9.50 an hour. Pay raises for all employees are based on the same criteria, years of service, and any “across the board” raises are given to drivers and warehousemen at the same time. Most employees earn between \$10 and \$15 per hour. They share the same designated break room at the Employer’s facility, but the record does not disclose the frequency with which drivers actually use the break room. Former driver Kellough testified that he used the break room to review his paperwork in the mornings and would sometimes encounter warehouse employees while there. Both the drivers and the day warehouse employees wear uniforms that are provided by the Employer.

III. LEGAL FRAMEWORK

It is well settled that there is often more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Moreover, a union is not required to seek representation in the most comprehensive grouping of employees unless such grouping alone constitutes an appropriate unit. *Bamberger’s Paramus*, 151 NLRB 748 (1965). As the Petitioner correctly points out, the Act does not require that a unit for bargaining be the only appropriate unit, or even the most appropriate unit; rather the unit sought must be *an* appropriate unit. *Transerv Systems*, 311 NLRB 766 (1993); *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). Although not dispositive, a petitioner’s unit desire is a relevant consideration. *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964). However, the Board will not find an arbitrary or artificial grouping of employees to be appropriate. *Moore Business Forms, Inc.*, 204 NLRB 552 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Thus, I must first examine whether the unit sought by the Petitioner is appropriate. If it is not, I must examine the alternative unit proposed by the Employer, but I retain authority to select a unit that is different from that proposed by the Petitioner or the alternative unit sought by the Employer. *Boeing Co.*, 337 NLRB 152, 153 (2001).

^{4/} The record does not indicate when Howe transferred from being a warehouse employee to a driver. Kellough’s testimony reflects that Howe was a warehouse employee at the time that Kellough observed him filling in for drivers.

The Board will not grant a labor organization its desired unit where such a proposed unit does not possess a separate community of interest from the Employer's other employees. *Brand Precision Services*, 313 NLRB 657 (1994). In analyzing this issue, I am cognizant of Board precedent which states that "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951). In determining whether a proposed grouping of employees possess a distinct community of interest from other employees, the Board looks at factors such as the degree to which their jobs are functionally integrated, frequency of contact with other employees, interchange among the employees, the nature of the employee skills and functions, commonality of wages, hours, benefits and other working conditions, and shared supervision. *Publix Super Markets, Inc.*, 343 NLRB 109 (2004).

IV. ANALYSIS

Functional Integration:

Applying the legal framework cited above, I find that the drivers do not have a sufficiently distinct community of interest separate from the warehouse employees to constitute an appropriate unit. In arriving at this conclusion, I am particularly persuaded by the high degree of integration between the driver and warehouse employee functions. See, *Boeing Company*, 337 NLRB 152, 153 (2001) (High degree of functional integration outweighed the lack of interchange and common supervision among employees in three separate departments.) It is clear that the Employer's primary objective, moving its product from its warehouse to its customers, can only be accomplished through the coordinated efforts of the warehousemen and drivers. *Boeing*, 337 NLRB at 153. Each classification relies on the other to accomplish its respective task in this process. Thus, the day warehouse employees receive and stage the product from which the night warehouse employees pick and load the trucks which are, in turn, used by the drivers to make deliveries. I note also that the night warehouse employees pick up the delivery trucks from the Employer's leasing agent as needed and also drive the trucks into the "picking area" for loading.

Interchange:

Regarding the frequency of interchange, there are a significant number of examples of employees in the disputed classifications performing each others' job functions. Thus, the record establishes that the Employer regularly utilizes almost a third of its day warehouse employees, approximately 3 to 5 employees, to substitute for drivers on regularly scheduled routes and to handle excess deliveries caused by increased orders or special deliveries. Such temporary substitutions are consistent, occurring one to two times a week, and the Employer has required the majority of the day warehouse employees to get the same DOT medical certification required of the drivers. Similarly, drivers who volunteer to work on Mondays pick and load their own trucks, a function that is typically performed by the night warehouse employees and for which they receive no additional pay. The day warehouse employees assist by loading skids of product onto the trucks when needed. Further, there have also been several permanent transfers between

the day warehouse and driver classifications, and four permanent transfers from night to day warehouse.

Function and Skills:

The drivers are not distinguishable from the warehouse employees based on any unique function or special skill requirements. While the drivers, in a literal sense, perform a different function than the warehouse employees, i.e., delivery of the product as opposed to stocking and/or loading the product, they are logistically inseparable from the warehouse employees upon whom they depend on a daily basis to accomplish their deliveries, particularly the night warehouse employees who pick the drivers' orders and load their trucks. There appears to be no variance in the skill level required to perform any of the jobs, all of which are learned through on-the-job training. The similarity in skill level is underscored by the fact that some of the day warehouse employees make deliveries and the drivers who work on Mondays pick and load their own trucks. Indeed, all employees are required to possess a valid driver's license and the DOT certification requirement for the drivers attests only to their physical fitness and not to any unique skills. In any event, a large majority of the day warehouse employees must carry the same DOT certification, albeit pursuant to the Employer's policy and not pursuant to government regulation.

Wages and Other Working Conditions:

The commonality in wages and other conditions of employment further blur any line of demarcation in community of interest factors between the drivers and warehouse employees. They all use the same time clock and are paid hourly, essentially earning the same pay rate of \$10 to \$15 an hour, with drivers and day warehouse sharing the same starting rate. They all receive pay raises at the same time and based on the same criteria. Both drivers and warehousemen receive the same new-employee orientation and enjoy identical fringe benefits such as vacations, holidays and health insurance. They operate under the same set of work rules. Both the drivers and day warehouse employees are required to wear Employer-provided uniforms. While the drivers and day warehouse employees each have their own immediate supervisor, differences in supervision do not mandate separate units. *Hotel Services Group, Inc.*, 328 NLRB 1116 (1999). Moreover, notwithstanding the absence of specific record examples demonstrating the purported "team effort" of Donnelly and Knellinger in supervising drivers and day warehouse employees, I note that they have the authority to direct and supervise employees in both classifications, which appears to be recognized by the drivers, and they both report directly to de la Pena, who oversees the entire warehouse and driver operation. Thus, there is commonality in supervision. See, e.g., *Calco Plating, Inc.*, 242 NLRB 1364, 1365 (1979).

Petitioner's Contentions:

As the Petitioner correctly points out, there appears to be relatively little work-related contact between the drivers and the warehouse employees, save for the daily contact between the drivers and the day warehouse employee who checks in their trucks. However, such infrequent contact is insufficient to distinguish the drivers as a separate appropriate bargaining unit given their dependence on the warehouse employees, particularly the night shift, and the vast similarity

in skill level, wages and other conditions of employment between the drivers and warehouse employees. cf. *Calco Plating, Inc.*, supra. The facts herein are distinguishable from *Mc-Mor-Han Trucking Co.*, 166 NLRB 700 (1967), wherein the Board found it inappropriate to compel the inclusion of mechanics in a petitioned-for unit of drivers. In *Mc-Mor-Han*, supra, the community of interest shared by the drivers was clearly distinguishable from that of the mechanics because they were paid by a different method; required special certification from the Interstate Commerce Commission, which also regulated many aspects of their employment; worked schedules completely different from the mechanics; and, were hired based upon different qualifications. *Mc-Mor-Han*, 166 NLRB at 701. The drivers here do not possess any such distinctive characteristics. The mere fact that they are primarily assigned to driving trucks and making deliveries is, standing alone, not grounds for finding that they have a community of interest separate from the warehouse employees.

In sum, I find that the many commonalities between the drivers and warehouse employees far outweigh the distinctions, which are relatively minor. Under these circumstances, a unit limited to the drivers would constitute an arbitrary grouping that is inappropriate for collective bargaining. Given the functional integration, interchange and nearly identical conditions of employment under which the employees work, the appropriate unit must include both classifications. Accordingly, I find that the unit sought by the Petitioner is not appropriate. I will therefore direct an election in the broader unit comprised of both drivers and warehouse employees contingent upon the Petitioner satisfying the conditions set forth below in the Direction of Election.

V. EXCLUSIONS

The parties stipulated and the record shows that the following employees are supervisors with the authority defined by Section 2(11) of the Act and, accordingly, I will exclude them from the unit: Greg Maurer, Executive Vice President and General Manager; Thomas de la Pena, Operations/Warehouse Manager; Jim Knellinger, Driver Supervisor; John Donnelly, Day Shift Warehouse Supervisor; Gary Vance, Night Shift Warehouse Supervisor; and Warren Conkey, Night Shift Warehouse Supervisor.

VI. CONCLUSIONS AND FINDINGS

Based upon the foregoing and the entire record in this matter, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. ^{5/}

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and warehouse employees employed by the Employer at its Columbus, Ohio facility, but excluding all other employees, sales employees, office clerical employees, maintenance employees, professional employees, managers, and all guards and supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. ^{6/} The employees will vote whether they wish to be represented for purposes of collective bargaining by Retail, Wholesale and Department Store Union, Local 379, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

VIII. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which

^{5/} At the hearing, the parties stipulated that during the past 12 months, a representative period, the Employer purchased and received at its Columbus, Ohio facility goods valued in excess of \$50,000 directly from points outside the State of Ohio. Accordingly, I am satisfied that the Employer's operations meet the Board's statutory standard for asserting jurisdiction.

^{6/} At the hearing, the Petitioner indicated its willingness to participate in an election should I direct an election in a unit different than requested. As the unit found appropriate is larger than the unit requested, the Petitioner is accorded a period of 10 days from the date of this Decision and Direction of Election in which to submit to the Regional Director an additional showing of interest, if necessary, to warrant an election in the broader unit. In the event, the Petitioner does not wish to proceed with an election, in the broader unit, it may withdraw its petition without prejudice by notice to the Regional Director for Region 9 within 7 days from the date of this Decision and Direction of Election.

commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

IX. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **October 8, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlrb.gov,^{7/} or by facsimile transmission at (513) 684-3946. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

^{7/} To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.


X. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

XI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **October 15, 2010**. The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov,^{8/} but may not be filed by facsimile.

Dated at Cincinnati, Ohio this 1st day of October 2010.


Gary W. Muffley, Regional Director
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401-7500
420-2900
420-2903
420-4000
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^{8/} To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.